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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1988

JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Petitioners,

vs.

CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

John H. Thomas
Attorney for Petitioners
John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc.
3037 S.W. 4th Avenue
Miami, Florida 33129
Tel: 305-858-2122

Joel V. Lumer
Attorney for Petitioners
John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc.
1002 Concord Building
66 West Flagler Street
Miami, Florida 33130
Tel: 305-374-3168
Counsel of Record

QUESTIONS PRESENTED

1. Does a state court have jurisdiction to enjoin travel through a channel that is part of the navigable waters of the United States after the U.S. Army Corps of Engineers has issued a letter ruling that the channel is a navigable water of the United States, that a project to block the channel is "contrary to the overall public interest", and that denies a permit to construct a blockage in the channel to the same parties who sought the injunction in state court?

2. Does a court abuse its discretion in enjoining travel through a channel that is part of the navigable waters of the United States into a lake designated as a "harbor of refuge" by the U.S. Army Corps of Engineers, where there was a history of travel through the channel for over 60 years, no improvements beyond test borings had been made by owners of the bottom land under the channel, the owners of the bottom land under the channel purchased it with knowledge that it was and historically had been used for access between the lake and the Miami River, the owners of the land on the lake purchased it with the expectation of access through the channel into the Miami River and Biscayne Bay, the owners of the land on the lake made substantial financial investments based on access through the channel years before those seeking the injunction purchased the bottom land under the channel, and eliminating access through the channel would cause severe business hardship to the owners of the land on the lake?

3. Does a court err in excluding from evidence, in an action seeking to enjoin passage from a lake through a channel that is a navigable water of the United States, the testimony of the permits chief of the U.S. Army Corps of Engineers concerning the character of the Corps' action in denying a permit to construct a blockage of the navigable waterway and the testimony of owners of land on the lake concerning the history of traffic through the channel, their investment expectations when they bought land on the lake, the investments in improvements they have made to land on the lake, the economic impact of the Corps of Engineers' ruling and the objective investment backed expectations of the party who purchased the bottom land under the channel?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc. and the respondents Cleveland Jones, Jr., Caroline Jones, Frank Jones, Joyce Jones and Jones Boatyard, Inc. Lauderdale Enterprises, Inc. was a party before the Florida Eleventh Circuit Court, but was not a party before either the Florida Third District Court of Appeal or the Florida Supreme Court.

There are no parent companies, subsidiaries or affiliates of Defender Yacht Corp. or Atlantic Aeromarine Associates, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

The petitioners, John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Florida Third

District Court of Appeal entered in the above entitled proceeding on December 6, 1988.

OPINIONS BELOW

The judgment of the Florida Supreme Court declining to accept jurisdiction has not been reported and is reprinted in the appendix hereto, App. 1, *infra*.

The opinion of the Florida Third District Court of Appeal is reported at 534 So.2d 875 and is reprinted in the appendix hereto, App. 3, *infra*.

The final judgment of the Florida Eleventh Circuit Court (Tanksley, J.) has not been reported. It is reprinted in the appendix hereto, App. 12, *infra*.

JURISDICTION

The opinion of the Florida Third District Court of Appeal was filed on December 6, 1988. The Florida Supreme Court declined to accept jurisdiction to review that opinion by order entered on April 14, 1989.

The jurisdiction of this Court to review the judgment and opinion of the Florida Third District Court of Appeal is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

33 U.S.C. § 403. **Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.** The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 409. **Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels.** It shall not be lawful to tie up or anchor vessels or other

craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner, lessee, or operator so to do shall be unlawful; and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

STATEMENT OF THE CASE

Petitioners are owners of land in and on Palmer Lake in Miami, Florida, who are engaged in the marine related businesses of building, storing and repairing boats. Palmer Lake has been designated by the U.S. Army Corps of Engineers as a Harbor of Refuge and appears as such on the Miami Harbor, Fla., Department of the Army, Jacksonville District, Corps of Engineers map 9-30-83, which is reprinted in the appendix hereto, App. 20, *infra*. Palmer Lake is connected by a channel to the Miami River which flows into Biscayne Bay, an inlet of the Atlantic Ocean.

At one point in time, at least from 1962, Maule Industries owned both Palmer Lake and the channel connecting it to the Miami River. Ismael Fuentes purchased from Maule a part of the lake and part of the lake front that is presently owned by John Picciolo. In either 1977 or 1978 Picciolo purchased this property from Fuentes. When Picciolo purchased the parcel the public had general use of the channel into Palmer Lake, and in his business Picciolo and his customers come through the channel into the lake. The land on which Defender Yacht is operating was purchased in approximately 1978. At the time it was obvious and visible that boats had free access into Palmer Lake through the channel. Defender, in reliance, built major facilities, including buildings, docks and work yards at which they construct large, commercial-type vessels. Atlantic Aeromarine operates a small boatyard on Palmer Lake that was built between 1981 and 1983. Before purchasing, the principal of Atlantic Aeromarine had seen boats commonly go to and from the Miami

River into Palmer Lake. For these three businesses there is no other water access to the Miami River other than the channel at issue.

In 1983 Jones Boatyard purchased from the bankruptcy trustee of Maule Industries the land under the channel connecting the Miami River and Palmer Lake. Jones is in the business of repairing yachts and large commercial vessels. It also owns the land adjacent to the channel where it operates its boatyard. From the 1920's forward Cleveland Jones observed boat and barge traffic travelling from the Miami River into Palmer Lake and back. At the time it purchased the land under the channel, Jones knew, at least, of the business operations of Picciolo and Defender Yacht.

On June 27, 1986 the U.S. Army Corps of Engineers denied Cleveland Jones a permit to construct a roofed synchro-lift and support structures in the channel that leads from the Miami River to Palmer Lake. The letter ruling of that date is reprinted in the appendix hereto, App. 18 *infra*. The project was determined to be contrary to the overall public interest, because it "would have an extreme adverse effect on navigation by eliminating ingress/egress to Palmer Lake, a navigable water of the United States." (Appendix p. 18, *infra*.) Jones was, at another time, permitted to build other piers that do not cross or block the channel connecting Palmer Lake to the Miami River.

Jones Boatyard and the individual respondents filed an action in the Florida Eleventh Circuit Court to quiet title and enjoin the petitioners and Lauderdale Enterprises, Inc. from using the channel between

Palmer Lake and the Miami River. At the trial, the court excluded the testimony of the U.S. Army Corps of Engineers' permits chief concerning the nature of Palmer Lake as a harbor of refuge, the nature of the Corps of Engineers' ruling in denying a permit for activity that would block navigation in the channel to Palmer Lake and the purpose for the Corps' position that no one could block navigation through the channel without a permit from the Army Corps of Engineers. The court also excluded the testimony of John Picciolo concerning the history of use of the channel, Jones' knowledge of Picciolo's business operations, Jones' reasonable expectations when Jones bought the channel in 1983, and the economic impact of the Corps' ruling—and its potential reversal—on both Jones and Picciolo. Similar testimony from Oscar White, a principal in Defender Yacht, and Felix Gonzalez, a principal in Atlantic Aeromarine, was also disallowed.

On March 4, 1988 the Florida circuit court enjoined the petitioners from any use of the channel at issue. The court specifically held that: "Although the Corps of Engineers has regulatory jurisdiction over the area, JONES' boat basin is private property to which there is no right of public access or use." (Appendix p. 16, *infra.*) An appeal was taken to the Florida Third District Court of Appeal, where the only issues presented by the appellants were the three same issues listed in the questions presented above. The District Court of Appeal affirmed the judgment of the trial court, and in its opinion said:

> Appellants assert that the channel is a navigable waterway subject to the exclusive jurisdiction of federal law under the preemption doctrine. Appellees maintain the waterway is their private property. In our view, the answer depends on whether the access channel to Palmer Lake is a natural or an artificial waterway. Only a waterbody which was navigable in its natural state at the time Florida became a state in 1845 is subject to federal or state sovereignty.

Picciolo v. Jones, 534 So.2d 875, 877 (Fla. 3d DCA 1988). (Appendix p. 9, *infra.*) The court goes on to hold: "The fact that the waterway is subject to the regulatory power of the State of Florida and the United States Corps of Engineers does not conclude the matter; the power to regulate does not vest either the state or the federal government with sovereign title which would permit a taking for public use without payment to the owner of just compensation." 534 So.2d at 878. (Appendix p. 10, *infra.*) The Florida Supreme Court declined to accept jurisdiction and did not reach the merits in its judgment. (Appendix p. 1, *infra.*)

REASONS FOR GRANTING WRIT

I.

THE FLORIDA COURTS' BASIS FOR EXERCISING JURISDICTION TO ENJOIN TRAVEL THROUGH A NAVIGABLE WATER OF THE UNITED STATES CONFLICTS WITH THE DECISIONS OF THIS COURT ON FEDERAL PREEMPTION AND THE SUPREMACY OF THE LAWS OF THE UNITED STATES

The laws of the United States are the supreme law of the land. U.S. Const. art. VI, § 2. Congress alone may legislate over matters which are necessarily national in import. *Goldstein v. California*, 412 U.S. 546, 554 (1973). In the area of interstate and foreign commerce it is said that: "Whatever subjects of this power are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852).

As part of its authority under the commerce clause of the U.S. Constitution, Congress has the power to control navigation in the navigable waters of the United States to the exclusion of any competing or conflicting authority. *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956). This Court has affirmed that "there is no doubt that the United States possesses the power to control the erection of structures in navigable waters." *United States v. Appalachian Electric Power*

Co., 311 U.S. 377, 405 (1940). In the exercise of this power, Congress has enacted 33 U.S.C. § 403 which prohibits the obstruction of the navigable capacity of any waters of the United States, not affirmatively authorized by Congress, except upon plans recommended by the Chief of Engineers and approved by the Secretary of the Army. A Florida judge is neither the Congress nor the Secretary of the Army.

The commerce clause limits the power of the states to interfere or impose burdens on interstate commerce. *Western and Southern Life Insurance Company v. State Board of Equalization*, 451 U.S. 648, 652 (1981). When Congress adopted what is now 33 U.S. § 403 it "meant thereafter no state should interfere with the navigability of a stream" and "nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government." *United States v. Rio Grande Dam & Irrigation Company*, 174 U.S. 690, 708 (1899). Congress intended that "anything wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition [of the act]." *Rio Grande Dam*, 174 U.S. at 708. An injunction which prohibits travel through a navigable waterway tends to destroy its navigable capacity.

The preemption doctrine applies to federal administrative acts when the agency is acting within the scope of its Congressionally delegated authority. *Louisville Public Service Commission v. F.C.C.*, 476 U.S. 355, 374 (1986). Where a detailed federal regulatory

scheme exists and where its general thrust will be impaired by incompatible state action, that state action is preempted by federal law. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 885 (1986). The U.S. Army Corps of Engineers has developed a detailed federal regulatory scheme to govern the navigable waters of the United States. In 33 C.F.R. § 209.170 the Corps spells out what will be considered violations of the navigable waterway laws, what the penalties will be, and how enforcement procedures are to be carried out. In 33 C.F.R. Part 325 the Corps sets the guidelines and procedures for permits to modify the general rules. Part 326 regulates enforcement of the permitting laws and Part 327 guarantees public hearings for permit actions. In the present case, the general thrust of the regulatory scheme, which has ruled against obstructing the waterway at issue, will be impaired by the incompatible state action that has enjoined passage through the same waters.

It is within the power of Congress to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate. *International Longshoremen's Association v. Davis*, 476 U.S. 380, 388 (1986). Jurisdiction provided by state law is preempted by federal law vesting exclusive jurisdiction over that controversy in another body. *Davis*, 476 U.S. at 388, 391. Any judgment issued by a state court should be void *ab initio*, because subject matter jurisdiction is preempted. *Id.* at 392.

Judicial review of federal administrative proceedings is generally provided by 5 U.S.C. § 706 absent some clear and convincing evidence of a contrary

legislative intent. *Traynor v. Turnage*, 108 S.Ct. 1372, 1379 (1988). Ordinarily, the rulings of the Army Corps of Engineers under 33 U.S.C. § 403 are reviewed in the U.S. District Courts with appellate jurisdiction in the U.S. Courts of Appeals. See the cases collected at 25 A.L.R. Fed. 706. Respondents have made an "end-run" on the federal regulatory scheme and judicial review in the United States courts by suing private parties in a state court and obtaining indirectly by injunction what they could not obtain directly through the Corps of Engineers. In the Florida court, the Corps of Engineers was not present to protect the interests of the United States and the petitioners were constrained by the language of *California v. Sierra Club*, 451 U.S. 287, 296 (1981), which says "that in enacting the Act [33 U.S.C. § 403] Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways." (footnote omitted).

This Court will infer preemption of state law where 1) Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, 2) state law conflicts with federal law because it is impossible to comply with both, or 3) state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Northwest Central Pipeline Corporation v. State Corporation Commission*, 109 S.Ct. 1262, 1273 (1989).

The injunction of the Florida court conflicts with the ruling of Corps of Engineers and it is impossible to comply with both. A waterway cannot be a harbor of

refuge open to ingress/egress by order of the Army Corps of Engineers and at the same time closed to navigation by injunction of the Florida courts. This will lead to inevitable confrontation between the Dade County, Florida sheriff's department attempting to enforce the injunction and the troops of the U.S. Army seeking to maintain the navigable waters of the United States. The laws of Florida, as interpreted by its courts, stand as an obstacle to the clearly stated Congressional objective of maintaining unobstructed commerce in the navigable waters of the United States. A challenge to Congressional authority could not be clearer nor more direct.

The rationale that this is "private property" is unavailing as a reason to ignore the authority of Congress. In both *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 n.5 (1960), and *United States v. Pennsylvania Chemical Corp.*, 411 U.S. 655, 674 (1973), this Court has held that in the area of obstruction to navigable waters the administrative construction of the law by the Army Corps of Engineers is entitled to great weight and constitutes a body of experience and informed judgment to which the litigants may properly resort for guidance. In 33 C.F.R. Part 329, the Corps has defined and construed the phrase "navigable waters of the United States." 33 C.F.R. § 329.8 (a)(3) says, in part: "Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability." While state law determines property rights, it is federal law that determines navigation rights. *United States v. Appalachian Electric Power Co.*, 311 U.S. at 405. The responsible federal authority, interpreting the relevant

federal statute, has said that these are navigable waters open to commerce.

Florida courts have vested themselves with jurisdiction to thwart the rulings of an agency of the United States. Not only is this a challenge to the supremacy of the national government, but it strikes at a substantive area, interstate and foreign commerce, that the framers of the Constitution intended to be free from impediments created by each of the several states. *The Federalist* No. 22, at 137 (A. Hamilton) (J. Cooke ed. 1961). In our federal union this cannot be allowed to prevail.

II.

THE FLORIDA COURTS' SUBSTANTIVE STANDARDS FOR ENJOINING TRAVEL THROUGH THE NAVIGABLE WATERS OF THE UNITED STATES ARE IN CONFLICT WITH THE SUBSTANTIVE STANDARDS EMPLOYED IN THE DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS

Congress has the power to keep navigable waters of the United States open and free. *United States v. Appalachian Electric Power Co.*, 311 U.S. at 405. This has nothing to do with property rights. As stated in *United States v. Twin City Power Co.*, 350 U.S. at 224-25: "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not property. . . . The power is a privilege which we have

called a 'dominant servitude' [citations omitted] or 'a superior navigational easement.' " The rights of all title holders of navigable waterbeds are subject to the dominant power of the federal government in respect of navigation. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704 n.3 (1987).

The Florida courts viewed navigation solely in terms of property rights. The Florida circuit court opinion, quoted with approval by the Florida district court says: "Although the Corps of Engineers has regulatory jurisdiction over the area, JONES' boat basin is private property to which there is no right of public access or use." *Picciolo v. Jones*, 534 So.2d at 876. The Florida district court goes on to hold that the navigational use would constitute a "taking for public use without payment to the owner of just compensation." *Id.* at 878.

This latter holding conflicts with this Court's statement that:

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

United States v. Cherokee Nation of Oklahoma, 480 U.S. at 704 quoting from *United States v. Rands*, 389 U.S. 121, 123 (1967). Under the precedents of this Court,

these types of easements imposed on property for the public weal are "properly treated as part of the burden of common citizenship." *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 491 (1987). That opinion distinguished between a permanent physical occupation, a taking, and rules which govern use, a proper regulation, in saying:

> It is well settled that a " 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see e.g. *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests.

DeBenedictis, 480 U.S. at 488-489 n. 18.

The Florida courts held that "[o]nly a waterbody which was navigable in its natural state at the time Florida became a state in 1845 is subject to federal or state sovereignty." *Picciolo v. Jones*, 534 So.2d at 877. This is contrary to the administrative interpretation of the law provided by the Army Corps of Engineers and conflicts with the decisions of this Court and the federal courts of appeals.

33 C.F.R. § 329.8(a)(1) says, in part:

> An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable.

33 C.F.R. § 329.9(a) says, in part: "Once having attained the character of 'navigable in law,' the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action." With this definition of navigable waters, the Corps has issued a rule which says: "A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface." 33 C.F.R. § 320.4.

The standard of navigability adopted by the Florida courts was directly rejected by this Court in *United States v. Appalachian Electric Power Co.*, 311 U.S. at 408-409, where the Court said:

> Although navigability to fix ownership of the river bed or riparian rights is determined as the cases just cited in the notes show, as of the

> formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable. There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.

(footnotes omitted). In *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court held that the Erie Canal was part of the navigable waters of the United States, saying: "The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means. . . ." 191 U.S. at 26. In *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932), the court held that the New York Barge Canal was "a waterway which was part of the navigable waters of the United States. . . ." 284 U.S. at 272. Neither of these artificial canals was navigable in its natural state in 1787.

The U.S. Court of Appeals for the Fifth Circuit held in *United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981), that the Corps of Engineers had the authority

to prevent the obstruction of an artificial and privately owned canal that was completed in either 1965 or 1966. *City of Centralia v. F.E.R.C.*, 851 F.2d 278, 281 (9th Cir. 1988), holds that a river is navigable for federal regulatory purposes where the navigability is the result of artificial improvements. *United States v. Tull*, 769 F.2d 182, 188 (4th Cir. 1985), approves of the Corps of Engineers regulation at 33 C.F.R. § 329.8(a), which gives it authority over canals and artificial waterbodies. None of these courts agrees with the rule of the Florida courts that federal regulatory control to stop obstructions in navigable waterways is applicable only to those waterways that were navigable in their natural condition at the time of a state's entry into the federal union.

It is disruptive of the federal regulatory scheme and the free flow of commerce for one state to opt out of the system and remove some of its waterways from the process. Further judicial action is necessary in this Court to return harmony to the regulatory process, to reestablish the supremacy of the United States and to reopen the navigable waters of the United States.

III.

THE FLORIDA COURTS, IN DECIDING THE FEDERAL QUESTION OF ENJOINING TRAVEL THROUGH THE NAVIGABLE WATERS OF THE UNITED STATES, HAVE EXCLUDED EVIDENCE ON THE FACTORS WHICH THE DECISIONS OF THIS COURT SAY ARE THE MOST IMPORTANT IN DECIDING THAT QUESTION

The Florida circuit court, in ruling that there was no right of navigation, relied on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). That decision says at the relevant part:

> this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.

444 U.S. at 175. Petitioners presentation of evidence concerning these factors was stricken by the trial judge.

Petitioners attempted to offer the testimony of the permits chief of the U.S. Army Corps of Engineers concerning the character of the governmental action, but this was stricken. Testimony concerning the economic impact of the regulation, keeping open versus closing the channel, was also disallowed. Further, the court ruled irrelevant the testimony of the petitioners' witnesses that concerned the reasonable investment backed expectations of someone purchasing this channel in 1983 given the history of its open and known use for the preceding 60 years.

The rule of law established by *Kaiser Aetna* is not an absolute one denying all right of public access to a channel whose bottom land is privately owned. The author of the opinion of the court stated in a later case that:

> The parties, including respondent here, clearly understood that the navigational servitude was dominant no matter how the question of riverbed ownership was resolved. See, e.g., Brief for Petitioner in *Cherokee Nation v. Oklahoma*, O. T. 1969, No. 59, p. 19 ("[T]here is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation"). Any other conclusion would be wholly extraordinary, for we have repeatedly held that the navigational servitude applies to *all* holders of riparian and riverbed interests.

Cherokee Nation of Oklahoma, 480 U.S. at 706 (footnote

omitted). Rather, *Kaiser Aetna* establishes a balancing test where various evidentiary factors are to be considered. To apply *Kaiser Aetna* without allowing the factual inquiries mandated by that opinion creates a direct and substantial conflict with a decision of this Court. A decision of this Court is needed to harmonize how the courts of this nation will decide whether public access will be allowed through the navigable waters of the United States.

CONCLUSION

For the reasons stated above, petitioner prays that the Court accept jurisdiction of this case. The issues involved concern the basic nature of the relationship between agencies of the United States and the courts of one of the states. The substantive area, navigation, affects many millions of our citizens. A decision of this Court is needed to re-establish an orderly process for determination of when obstructions will be allowed to the navigable waters of the United States.

Date: July 12, 1989

Joel V. Lumer
Attorney for Petitioners
John M. Picciolo, Defender
Yacht Corp. and Atlantic
Aeromarine Associates, Inc.
1002 Concord Building
66 West Flagler Street
Miami, Florida 33130
Tel: 305-374-3168
Counsel of Record

John H. Thomas
Attorney for Petitioners
John M. Picciolo, Defender
Yacht Corp. and Atlantic
Aeromarine Associates, Inc.
3037 S.W. 4th Avenue
Miami, Florida 33129
Tel: 305-858-2122

Appendix

Supreme Court of Florida

FRIDAY, APRIL 14, 1989

JOHN. M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Petitioners,

v.

CLEVELAND JONES, JR., CAROLYN JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Respondents.

CASE NO. 73,525

District Court of Appeal,
Third District
No. 88-898

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

A True Copy
TEST:
SUPREME COURT SEAL

Sid J. White
Clerk Supreme Court

cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. John A. Tanksley, Judge

Joel V. Lumer, Esquire
Raab & Strader, P.A.
Sheila Wolfson, Esquire
Anthony J. O'Donnell, Jr., Esquire

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1988

CASE NO. 88-898

JOHN M. PICCIOLO, DEFENDER YACHT CORPORATION and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Appellants,

vs.

CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Appellees.

Opinion filed December 6, 1988.

An Appeal from the Circuit Court for Dade County, John A. Tanksley, Judge.

Raab & Strader; Joe V. Lumer, for appellants.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel and Sheila Wolfson; Akerman, Senterfitt & Eidson and Anthony J. O'Donnell, Jr., for appellees.

Before HUBBART, BASKIN, and JORGENSON, JJ.

BASKIN, Judge.

This is an appeal from a final judgment in which the trial court enjoined appellants from using the waterway owned by appellees. We agree with the trial court's reasoning and commend the clarity of the findings of fact and conclusions of law. The trial court found:

FINDINGS OF FACT

1. Plaintiffs, CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES and JONES BOAT YARD, INC. are the owners of a boat basin located since 1922 along the Miami Canal. A portion of Plaintiffs' property is submerged land adjoining the Palmer Lake rockpit.

2. The submerged land adjacent to Palmer Lake is privately owned by Plaintiffs, having been acquired from Maule Industries' Trustee in bankruptcy.

3. Defendants, JOHN M. PICCIOLO, LAUDERDALE ENTERPRISES, INC., DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC. are an owner and two lessees of property bordering the Palmer Lake rockpit.

4. Plaintiffs' expert witness in the field of surveying, Alfred Mohr, testified that he had located the following historical records concerning the development of waterbodies in

the area of where Jones Boat Yard and the Palmer Lake rockpit are located:

A. A federal General Land Office survey conducted in 1845 shows Sections 28 and 29 of the township where Jones Boat Yard and the Palmer Lake rockpit are now located as "Everglades" land and does not show any bodies of water in these sections.

B. A 1917 plat of the Miami Canal and Miami River shows no waterbody other than the Miami Canal in the area where Jones Boat Yard and Palmer Lake are now located.

C. A 1925 plat of Curtis Field Tract shows the Miami Canal as the only waterbody in the area where Jones Boat Yard and Palmer Lake are presently located.

D. A 1925 Hopkins Map shows a waterbody described as a drainage ditch and that was not previously shown on the 1917 plat, running north and south from the Miami Canal in the area where Jones Boat Yard is now located.

E. A 1936 Hopkins Map shows two changes in the water bodies in the area. First, only a short section of the drainage ditch remains where it connects with the Miami Canal. Second, the Palmer Lake rockpit now appears and is connected to the Miami Canal

by the present day channel, which is just west of where the drainage ditch connected with the Miami Canal on the 1925 map.

F. A topographical survey based on data collected in 1939 shows "Palmer Lake Rockpits" with a channel connecting to the Miami Canal.

5. Cleveland Jones testified that he recalls dredging occurring in Palmer Lake when he was a child in the 1920's.

6. It is beyond dispute that today the Jones Boat Yard area is a waterbody that is navigable in fact. However, there is no evidence whatsoever in the record to support Defendants' claim that there was a navigable body of water in the Jones Boat Yard area in 1845. The only reasonable conclusion is that the water bodies in the area appearing after the 1845 survey are man-made.

7. Cleveland Jones testified that he observed Maule Industries blocking access to the Palmer Lake rockpit by positioning barges across the entrance in approximately 1962.

8. Marvin Sokolow testified that he owns most of the submerged land of the Palmer Lake rockpit, including the area where Palmer Lake abuts Jones' submerged land that fronts on the Miami Canal.

9. Marvin Sokolow testified that each year he places a cable with a sign indicating his ownership of the submerged land under Palmer Lake across the entrance from Palmer Lake to the Miami Canal, and evidence was presented that Sokolow has given written notice to other property owners on the rockpit that they have no right to use his private property without his permission.

10. Cleveland Jones testified that he was granted a permit by Dade County, the Corps of Engineers, and State agencies to construct piers on his property adjacent to the Palmer Lake rockpit entrance, but has been denied a permit by the Corps of Engineers to construct a hydraulic lift in this area.

11. Cleveland Jones and Marvin Sokolow both testified that all Defendants have access to their property from a public road, and Defendants presented no evidence to contradict this testimony.

12. There was no evidence presented that any of the Defendants possess a deed or other duly written document from which an easement might be implied that would grant any Defendant a right to use JONES' private property.

CONCLUSIONS OF LAW

1. JONES' property is a man-made waterbody that is not sovereignty land because there is no evidence that it was a navigable waterbody in 1845. *Odom v. Deltona*, 341 So.2d 977 (Fla. 1977).

2. Although the Corps of Engineers has regulatory jurisdiction over the area, JONES' boat basin is private property to which there is no right of public access or use. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979).

3. Defendants, JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC., are not entitled to the beneficial use of the surface waters of JONES' boat basin by sole virtue of the fact that they own or lease portions of the contiguous Palmer Lake rockpit. *Anderson v. Bell*, 433 So.2d 1202 (Fla. 1983).

4. Defendants do not possess an implied easement granting them the right to use JONES' property because they have not met either of the two requirements for such an easement as set forth in *Tortoise Island Communities, Inc. v. Moorings Association, Inc.*, 489 So.2d 22 (Fla. 1986) (adopting dissent in 460 So.2d 961, 966 (Fla. 5th DCA 1984)

The question before this court is whether the access channel to Palmer Lake is a sovereign waterway which must be kept open for public use. If the channel does not belong to the sovereign, but is privately owned, we must decide whether an easement permitting adjacent landowners to traverse the private waterway arises by implication. Appellants assert that the channel is a navigable waterway subject to the exclusive jurisdiction of federal law under the preemption doctrine. Appellees maintain the waterway is their private property. In our view, the answer depends on whether the access channel to Palmer Lake is a natural or an artificial waterway. Only a waterbody which was navigable in its natural state at the time Florida became a state in 1845 is subject to federal or state sovereignty. *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976).

The evidence indicates that in 1845, when Florida was admitted to the Union, the access channel to Palmer Lake, and Palmer Lake itself, were nonnavigable marshlands. The access channel to Palmer Lake did not become a navigable waterbody until well into the 20th century. Thus, although the parties agree that this waterway is now navigable in fact,[1] it was not a navigable waterbody at the time of Florida's entrance into the Union, and is therefore not within the sovereign

---

[1]Waterbodies which are navigable in fact "include lakes, rivers, bays, or harbours, and all waters capable of practical navigation for useful purposes, whether affected by tides or not, and whether the water is navigable or not in all its parts towards the outside lines or elsewhere, or whether the waters are navigable during the entire year or not." Martin v. Busch, 93 Fla. 535, 112 So. 274 (Fla. 1927). Waterbodies which are navigable in fact may be regulated by federal and state governments.

title of the State of Florida or of the United States. The fact that the waterway is subject to the regulatory power of the State of Florida and the United States Corps of Engineers does not conclude the matter; the power to regulate does not vest either the state or the federal government with sovereign title which would permit a taking for public use without payment to the owner of just compensation.[2] *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 100 S.Ct. 399, 62 L.Ed.2d 365 (1979). We therefore hold that the trial court was correct in deciding that the access channel to Palmer Lake is not a sovereign waterbody and that Jones could restrict use of the channel.

The access channel to Palmer Lake was dredged in the early 1930's. It is an artificial waterbody which can be, and is, privately owned. *Publix Super Markets, Inc. v. Pearson*, 315 So.2d 98 (Fla. 2d DCA 1975) (riparian rights do not attach to artificial waterbodies). The Florida Supreme court held in *Anderson v. Bell*, 433 So.2d 1202 (Fla. 1983), that "the owner of property that lies adjacent to or beneath a *man-made, non-navigable* water body is not entitled to the beneficial use of the surface waters of the entire body by sole virtue of the fact that he/she owns contiguous lands." *Anderson* 433 So.2d at 1204 (emphasis in original). To hold otherwise

---

[2]Picciolo would have us decline to exercise jurisdiction over this matter on grounds that the federal regulation of the waterway preempts state law. We reject his argument. This lawsuit involves the power of the federal government to regulate navigable waterways. Because federal law does not preempt state law on this issue, the trial court was correct in excluding the testimony of Bertil Heimer of the Army Corps. of Engineers.

would defeat the financial expectations of the waterway owners.[3] *Anderson* 433 So.2d at 1205. Picciolo's ownership of land fronting on Palmer Lake does not afford him an absolute right to use the lake's privately owned access channel solely because the channel is contiguous to his property. This is not to say that Picciolo can never have a right to use the channel: he may obtain the right to use the property by contracting with Jones for a covenant or an easement.

Picciolo alleges that the trial court erred in holding that he does not have an easement by implication over the access channel to Palmer Lake. We find this argument to be without merit. To obtain an easement by implication, a landowner must demonstrate absolute necessity. *Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.*, 489 So.2d 22 (Fla. 1986). Picciolo failed to meet that standard. In fact, the evidence shows that Picciolo has easy access to his property by public road. Thus, the trial court correctly ruled that an easement by implication does not exist.

For the foregoing reasons, we affirm the decision of the trial court.

Affirmed.

---

[3]Picciolo argues that it was error to exclude the testimony of three witnesses as to the economic impact of Jones' assertion of private ownership and its effect upon Picciolo's financial expectations. Anderson v. Bell, 433 So.2d 1202 (Fla. 1983), places the focus on the expectations of the owner of the waterbody, not upon those who question his dominion. The trial court committed no error in excluding that testimony.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 84-35506

Section 21

CLEVELAND JONES, JR., CAROLINE JONES,
FRANK JONES, JOYCE JONES and
JONES BOAT YARD, INC.,

Plaintiffs,

v.

JOHN M. PICCIOLO, LAUDERDALE ENTERPRISES,
INC., DEFENDER YACHT CORP. and ATLANTIC
AEROMARINE ASSOCIATES, INC.,

Defendants.

FINAL JUDGMENT

This action was tried before the court. On the evidence presented, the Court makes the following findings:

FINDINGS OF FACT

1. Plaintiffs, CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC. are the owners of a boat basin located since 1922 along the Miami Canal. A portion of Plaintiffs' property is submerged land adjoining the Palmer Lake rockpit.

2. The submerged land adjacent to Palmer Lake is privately owned by Plaintiffs, having been acquired from Maule Industries' Trustee in bankruptcy.

3. Defendants, JOHN M. PICCIOLO, LAUDERDALE ENTERPRISES, INC., DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC. are an owner and two lessees of property bordering the Palmer Lake rockpit.

4. Plaintiffs' expert witness in the field of surveying, Alfred Mohr, testified that he had located the following historical records concerning the development of the waterbodies in the area of where Jones Boat Yard and the Palmer Lake rockpit are located:

A. A federal General Land Office survey conducted in 1845 shows Sections 28 and 29 of the township where Jones Boat Yard and the Palmer Lake rockpit are now located as "Everglades" land and does not show any bodies of water in these sections.

B. A 1917 plat of the Miami Canal and Miami River shows no waterbody other than the Miami Canal

in the area where Jones Boat Yard and Palmer Lake are now located.

C. A 1925 plat of Curtis Field Tract shows the Miami Canal as the only waterbody in the area where Jones Boat Yard and Palmer Lake are presently located.

D. A 1925 Hopkins Map shows a waterbody described as a drainage ditch and that was not previously shown on the 1917 plat, running north and south from the Miami Canal in the area where Jones Boat Yard is now located.

E. A 1936 Hopkins Map shows two changes in the water bodies in the area. First, only a short section of the drainage ditch remains where it connects with the Miami Canal. Second, the Palmer Lake rockpit now appears and is connected to the Miami Canal by the present day channel, which is just west of where the drainage ditch connected with the Miami Canal on the 1925 map.

F. A topographical survey based on data collected in 1939 shows "Palmer Lake Rockpits" with a channel connecting to the Miami Canal.

5. Cleveland Jones testified that he recalls dredging occurring in Palmer Lake when he was a child in the 1920's.

6. It is beyond dispute that today the Jones Boat Yard area is a waterbody that is navigable in fact. However, there is no evidence whatsoever in the record to support Defendants' claim that there was a navigable

body of water in the Jones Boat Yard area in 1845. The only reasonable conclusion is that the water bodies in the area appearing after the 1845 survey are manmade.

7. Cleveland Jones testified that he observed Maule Industries blocking access to the Palmer Lake rockpit by positioning barges across the entrance in approximately 1962.

8. Marvin Sokolow testified that he owns most of the submerged land of the Palmer Lake rockpit, including the area where Palmer Lake abuts Jones' submerged land that fronts on the Miami Canal.

9. Marvin Sokolow testified that each year he places a cable with a sign indicating his ownership of the submerged land under Palmer Lake across the entrance from Palmer Lake to the Miami Canal, and evidence was presented that Sokolow has given written notice to other property owners on the rockpit that they have no right to use his private property without his permission.

10. Cleveland Jones testified that he was granted a permit by Dade County, the Corps of Engineers, and State agencies to construct piers on his property adjacent to the Palmer Lake rockpit entrance, but has been denied a permit by the Corps of Engineers to construct a hydraulic lift in this area.

11. Cleveland Jones and Marvin Sokolow both testified that all Defendants have access to their property from a public road, and Defendants presented no evidence to contradict this testimony.

12. There was no evidence presented that any of the Defendants possess a deed or other duly executed written document from which an easement might be implied that would grant any Defendant a right to use JONES' private property.

CONCLUSIONS OF LAW

1. JONES' property is a man-made waterbody that is not sovereignty land because there is no evidence that it was a navigable waterbody in 1845. *Odom v. Deltona*, 341 So.2d 977 (Fla. 1977).

2. Although the Corps of Engineers has regulatory jurisdiction over the area, JONES' boat basin is private property to which there is no right of public access or use. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979).

3. Defendants, JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC., are not entitled to the beneficial use of the surface waters of JONES' boat basin by sole virtue of the fact that they own or lease portions of the contiguous Palmer Lake rockpit. *Anderson v. Bell*, 433 So.2d 1202 (Fla. 1983).

4. Defendants do not possess an implied easement granting them the right to use JONES' property because they have not met either of the two requirements for such an easement as set forth in *Tortoise Island Communities, Inc. v. Moorings Association, Inc.*, 489 So.2d 22 (Fla. 1986) (adopting dissent in 460 So.2d 961, 966 (Fla. 5th DCA 1984). it is therefore,

ORDERED AND ADJUDGED that

(1) Final Judgment is granted in favor of Plaintiffs on Counts I and II of the Complaint and against the Defendants on their counterclaim and Defendants shall take nothing by this action and go hence without day.

(2) Defendants are enjoined from any use of Plaintiffs' property.

(3) This Court reserves jurisdiction to tax costs and to enforce the injunctive relief granted.

(4) This Final Judgment has been read to Defendants' counsel.

ORDERED at Miami, Florida, on March 4th, 1988.

JOHN A. TANKSLEY,
Circuit Judge

CIRCUIT COURT JUDGE

Copies furnished to:
Sheila Wolfson, Esq.
John Thomas, Esq.

[JUN 27 1986]

Regulatory Division
Permits Branch
861PF-20334

Mr. Cleveland Jones
c/o Larsen & Associates
2 South Biscayne Boulevard
Suite 3650
Miami, Florida 33131-1803

Dear Mr. Jones:

This is in regard to your above-numbered application for a Department of the Army permit to construct a roofed Syncro-lift with associated support structures in an existing manmade tidal channel which leads from the Miami River to Palmer Lake (a tidal borrow pit). In addition, your request included dredging the channel and a portion of the Miami River to a depth of −20 feet at mean low water. The project location is further described as being at 3601 Northwest South River Drive in Section 28, Township 53 South, Range 41 East, Miami, Dade County, Florida.

Your proposal has been evaluated and it has been determined that such a structure, at the proposed location, would have an extreme adverse effect on navigation by eliminating ingress/egress to Palmer Lake, a navigable water of the United States.

Palmer Lake became a navigable water of the United States by dredging/excavating a navigable

channel between the Miami River and the lake prior to 1963, as evidenced by aerial photos taken in 1963 and January 1967 (copies enclosed for your reference). The connection is authorized by a Nationwide Permit issued July 19, 1977, by 33 CFR Part 330.3(b), which states "structures or work completed before December 18, 1968, or in water bodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation".

Accordingly, it has been determined that your project is contrary to the overall public interest. Therefore, your Department of the Army permit is hereby denied.

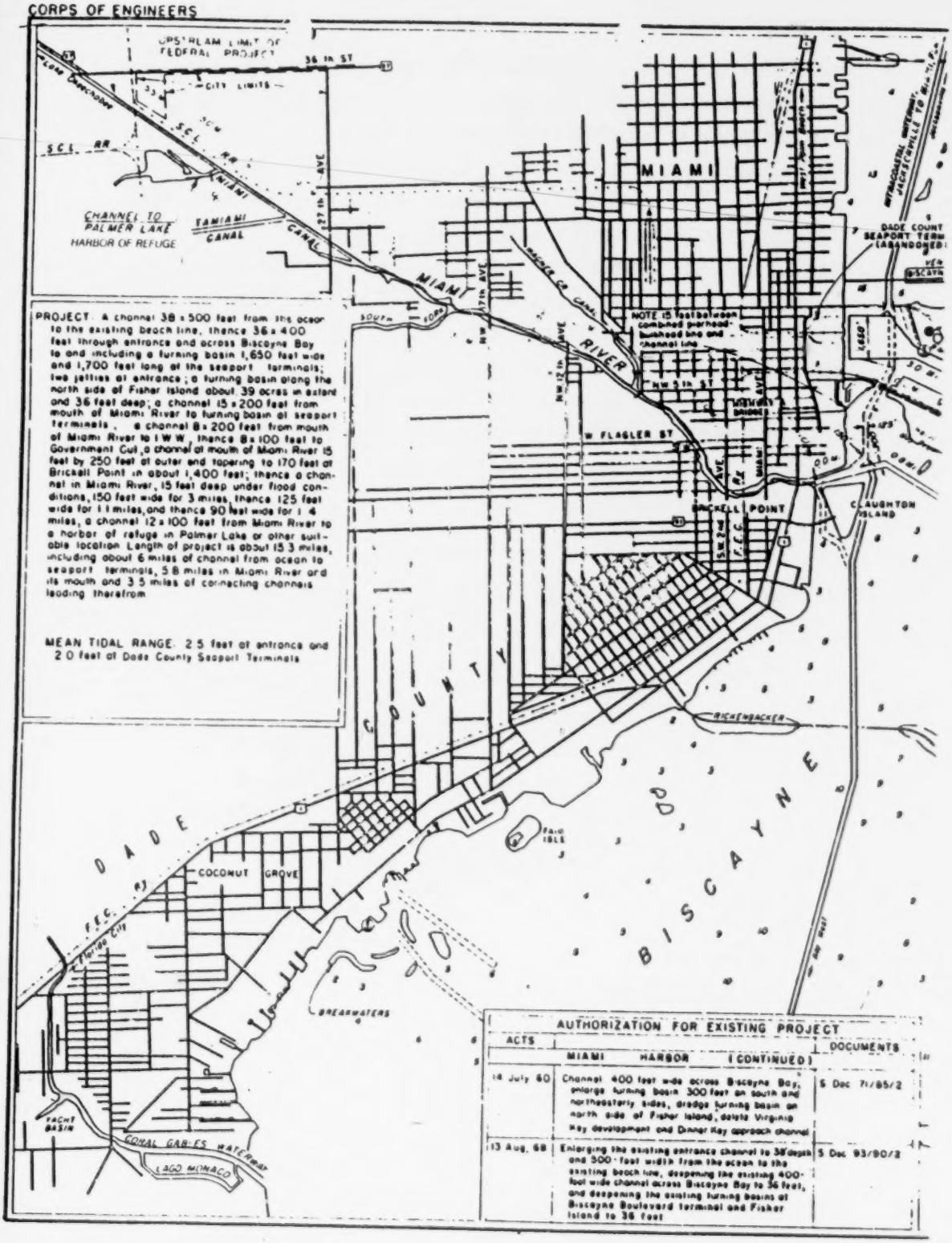
Any questions you may have should be directed to Mr. Lonnie Shepardson at the letterhead address or by telephone at (904) 791-1677.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

SIGNED: Charles T. Myers
Charles T. Myers III
Colonel Corps of Engineers
District Engineer

Enclosures

bcc (w/o encl):
DER, WEst Palm Beach (131187936)
SAJCH-R
SAJRD-PS (for coding) Complete date: May 1, 1986



PROJECT. A channel 38 x 500 feet from the ocean to the existing beach line, thence 36 x 400 feet through entrance and across Biscayne Bay to and including a turning basin 1,650 feet wide and 1,700 feet long at the seaport terminals; two jetties at entrance; a turning basin along the north side of Fisher Island about 39 acres in extent and 36 feet deep; a channel 15 x 200 feet from mouth of Miami River to turning basin at seaport terminals; a channel 8 x 200 feet from mouth of Miami River to I W W, thence 8 x 100 feet to Government Cut; a channel at mouth of Miami River 15 feet by 250 feet at outer end tapering to 170 feet at Brickell Point in about 1,400 feet; thence a channel in Miami River, 15 feet deep under flood conditions, 150 feet wide for 3 miles, thence 125 feet wide for 1 1 miles, and thence 90 feet wide for 1 4 miles; a channel 12 x 100 feet from Miami River to a harbor of refuge in Palmer Lake or other suitable location Length of project is about 15 3 miles, including about 6 miles of channel from ocean to seaport terminals, 5 8 miles in Miami River and its mouth and 3 5 miles of connecting channels leading therefrom

MEAN TIDAL RANGE. 2 5 feet at entrance and 2 0 feet at Dade County Seaport Terminals

AUTHORIZATION FOR EXISTING PROJECT

ACTS	MIAMI HARBOR (CONTINUED)	DOCUMENTS
14 July 60	Channel 400 feet wide across Biscayne Bay, enlarge turning basin 300 feet on south and northeasterly sides, dredge turning basin on north side of Fisher Island, delete Virginia Key development and Dinner Key approach channel	S Doc 71/85/2
13 Aug. 68	Enlarging the existing entrance channel to 38 depth and 500-foot width from the ocean to the existing beach line, deepening the existing 400-foot wide channel across Biscayne Bay to 36 feet, and deepening the existing turning basins at Biscayne Boulevard terminal and Fisher Island to 36 feet	S Doc 93/90/2

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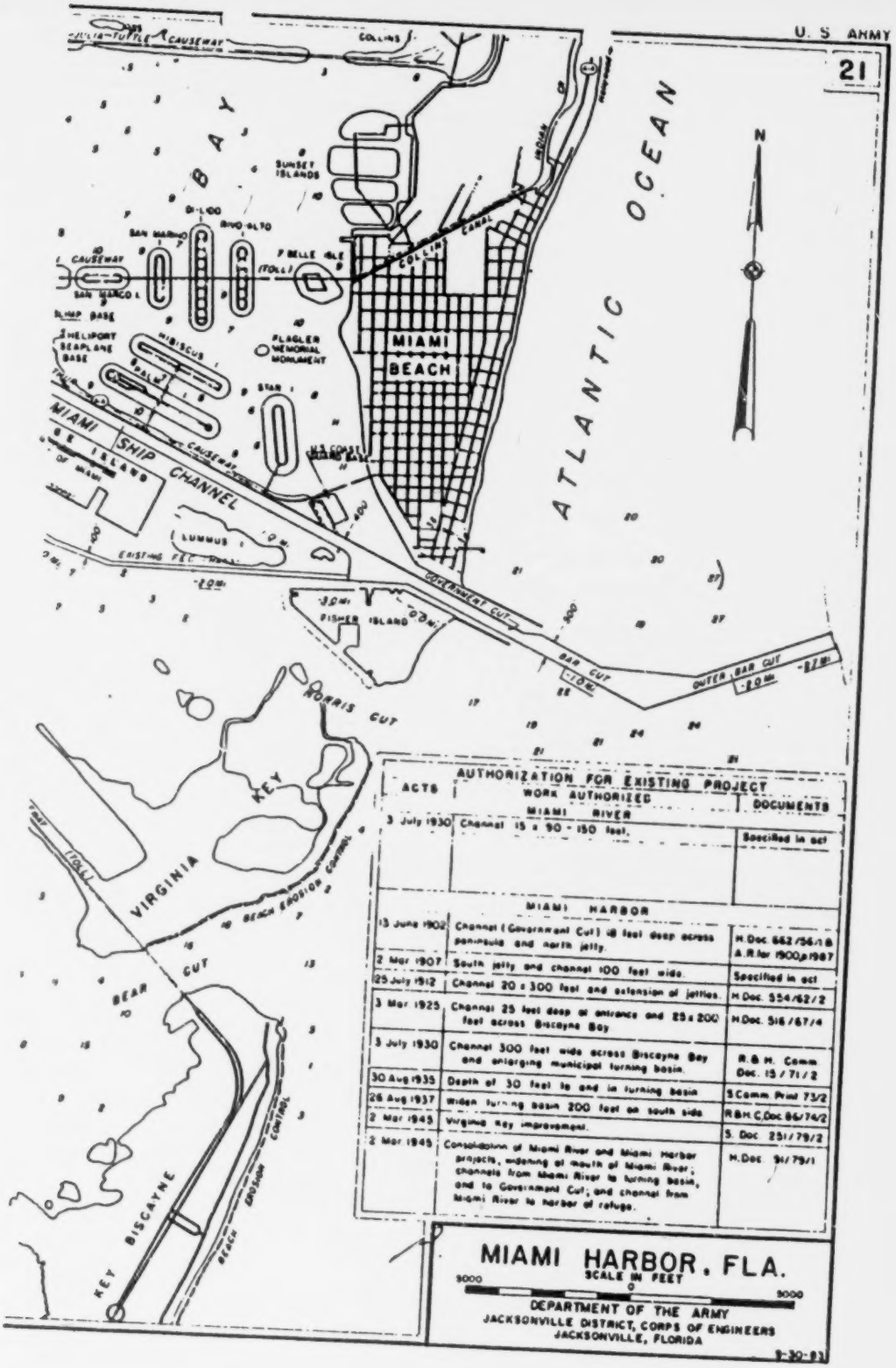
U. S. ARMY
21
BAY
ATLANTIC OCEAN
N
COLLINS
SUNSET ISLANDS
SAN MARCO
BIVD. ALTO
CAUSEWAY
SAN MARCO I
(TOLL)
MIAMI BEACH
COLLINS CANAL
HELIPORT SEAPLANE BASE
HIBISCUS
PALM
STAR
FLAGLER MEMORIAL MONUMENT
MIAMI SHIP CHANNEL
U.S. COAST GUARD BASE
LUMMUS
EXISTING FED. PROJ.
FISHER ISLAND
GOVERNMENT CUT
BAR CUT
OUTER BAR CUT
NORRIS CUT
KEY VIRGINIA
BEACH EROSION CONTROL
BEAR CUT
KEY BISCAYNE
AUTHORIZATION FOR EXISTING PROJECT
ACTS | WORK AUTHORIZED | DOCUMENTS
3 July 1930 | MIAMI RIVER: Channel 15 x 90 - 150 feet. | Specified in act
MIAMI HARBOR
13 June 1902 | Channel (Government Cut) 18 feet deep across peninsula and north jetty. | H.Doc. 662/56/1 & A.R.for 1900,p.1987
2 Mar 1907 | South jetty and channel 100 feet wide. | Specified in act
25 July 1912 | Channel 20 x 300 feet and extension of jetties. | H.Doc. 554/62/2
3 Mar 1925 | Channel 25 feet deep at entrance and 25 x 200 feet across Biscayne Bay | H.Doc. 516/67/4
3 July 1930 | Channel 300 feet wide across Biscayne Bay and enlarging municipal turning basin. | R & H. Comm Doc. 15/71/2
30 Aug 1935 | Depth of 30 feet in and in turning basin | S.Comm. Print 73/2
26 Aug 1937 | Widen turning basin 200 feet on south side. | R&H.C.Doc 86/74/2
2 Mar 1945 | Virginia Key improvement. | S. Doc 231/79/2
2 Mar 1945 | Consolidation of Miami River and Miami Harbor projects, widening at mouth of Miami River; channels from Miami River to turning basin, and to Government Cut; and channel from Miami River to harbor of refuge. | H.Doc. 91/79/1
MIAMI HARBOR, FLA.
SCALE IN FEET
3000 0 3000
DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT, CORPS OF ENGINEERS
JACKSONVILLE, FLORIDA
9-30-81

App. 21

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Supreme Court, U.S.
FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: 89-57

In The

SUPREME COURT

Of The

UNITED STATES

OCTOBER TERM, 1988

JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Petitioners,

vs.

CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI REVIEW

Anthony J. O'Donnell, Jr.
Attorney for Respondents
Akerman, Senterfitt & Eidson
801 Brickell Avenue
24th Floor
Miami, Florida 33131
Telephone: (305) 374-5600

CASE NO.: 89-57

In The

SUPREME COURT

Of The

UNITED STATES

OCTOBER TERM, 1988

JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

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Anthony J. O'Donnell, Jr.
Attorney for Respondents
Akerman, Senterfitt & Eidson
801 Brickell Avenue
24th Floor
Miami, Florida 33131
Telephone: (305) 374-5600

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444 U.S. 206 (1979) 1, 2, 3, 5, 6

FEDERAL QUESTION PRESENTED

Whether the assertion of federal regulatory jurisdiction over a privately owned, constructed and maintained boat basin imposes a coextensive navigational servitude so as to establish a right of public access to and use of that private waterway.

SUMMARY OF ARGUMENT

The only federal question presented by Petitioners has already been settled by the United States Supreme Court. In Vaughn v. Vermilion, 444 U.S. 206, 62 L.Ed.2d 365, 100 S.Ct. 399 (1979), the Supreme Court held that "no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause of Art I of the United State Constitution." Id. at 208-209. Accord, Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979). Accordingly, there is no reason for the Supreme Court to review this case under Rule 17, Rules of the Supreme Court.

ARGUMENT

Although Petitioners assert three separate questions for review by the Supreme Court, the only federal question presented is whether the regulatory jurisdiction of the United States over a private boat basin automatically makes that private waterway open for use by the public so that a state court cannot enjoin individuals from trespassing upon it. The Supreme Court has already settled this question against Petitioners. In Vaughn v. Vermilion, 444 U.S. 206, 62 L.Ed.2d 365, 100 S.Ct. 399 (1979), the Supreme Court addressed the question as follows:

> The second [federal question] is whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States . . . . We think that our opinion in Kaiser Aetna v. United States . . . adequately answers the second question presented for review and that the Louisiana Court of Appeal was correct in determining that on such facts no general right of use in the public arose by reason of the

> authority over navigation conferred upon Congress by the Commerce Clause of Art I of the United States Constitution (Emphasis added).

Id. at 208, 62 L.Ed.2d 368, 100 S.Ct. 401. Petitioners' present position was articulated in Vaughn v. Vermilion by the separate dissenting opinion of Justice Blackman who asserted a public right of access to and use of privately owned waterways:

> [R]espondent's predecessors in interest voluntarily undertook to transform land into navigable water for purposes of obtaining access to a highway of waterborne commerce. In doing so, they subjected their former fast land to the dominant federal interest in navigation and surrendered the right to control access to the canals.

Id. at 210, 62 L.Ed.2d 369, 100 S.Ct. 399. The opinion of the Supreme Court, however, rejected Justice Blackman's position and affirmed the judgment of the state appellate court which had held that no general right of public use of a private waterway arose by reason of the regulatory authority over navigation conferred upon Congress by the Commerce Clause. That same conclusion

applies to the judgment of Florida's appellate court below.

Petitioners' position on this federal question has likewise been rejected by the Supreme Court in Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979). In Kaiser Aetna, the Supreme Court expressly cautioned "that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called 'navigational servitude' cannot simply be lumped into one basket." Id. at 170, 62 L.Ed.2d 340, 100 S.Ct. 391. The Court pointed out that in many of the same cases presently relied upon by Petitioners, "the concept of navigability . . . was used for purposes other than to delimit the boundaries of the navigational servitude." Id. at 171. Accordingly, the Supreme Court concluded that the federal government's expansive regulatory authority over navigable waters was not coextensive with the public's navigational servitude:

> [T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kaupa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access. (Emphasis added)

Id. at 172 - 173, 62 L.Ed.2d 341, 100 S.Ct. 391. As in the Vaughn v. Vermilion decision, it was only the separate dissenting opinion of Justice Blackman which adopted the position advanced by Petitioners in this case that the public's right to use a private navigable waterbody was coextensive with the federal government's power to regulate that waterbody. Id. at 180, 62 L.Ed.2d 347, 100 S.Ct. 398.

CONCLUSION

Petitioners have presented no federal question which has not already been settled by the Supreme Court. Unless the Court wishes to revisit its decisions in

Vaughn v. Vermilion and Kaiser Aetna v. United States, and to impose a public navigational servitude on privately owned waterways that is coextensive with the regulatory jurisdiction of Congress under the Commerce Clause, there is no reason under Rule 17, Rules of the Supreme Court, for the Court to review this case. Accordingly, the petition for writ of certiorari should be denied.

DATE: August 28, 1989

Anthony J. O'Donnell. Jr.
Attorney for Respondents
Akerman, Senterfitt & Eidson
801 Brickell Avenue
24th Floor
Miami, Florida 33131
Telephone: (305) 374-5600

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No. 89-57

In The

Supreme Court of the United States

October Term, 1989

JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Petitioners,

vs.

CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

JOHN H. THOMAS
Attorney for Petitioners John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc.
3037 S.W. 4th Avenue
Miami, Florida 33129
Tel: 305-858-2122

JOEL V. LUMER
Attorney for Petitioners John M. Picciolo, Defender Yacht Corp. and Atlantic Aeromarine Associates, Inc.
1002 Concord Building
66 West Flagler Street
Miami, Florida 33130
Tel: 305-374-3168
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REASONS FOR GRANTING THE WRIT

Respondents assert that this court has already settled the questions presented for review in the cases of *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Neither of these cases involved an attempt to make an end run around the Administrative Procedure Act at 5 U.S.C. § 706 and the jurisdiction of the U.S. district courts, which is at the heart of the present case.

In the present case, the U.S. Army Corps of Engineers has ruled that the channel at issue is a navigable water of the United States and that the respondent cannot block that channel. Instead of following the procedures of the Administrative Procedure Act and seeking judicial review in the U. S. District Court, the respondents went to a state court and obtained an injunction that petitioners could not navigate through the channel involved in this case. In *Vaughn v. Vermillion Corp.*, 444 U.S. 206, there was no prior ruling by the U.S. Army Corps of Engineers concerning navigability and determining that the owner of the bottom land could not obstruct the navigable channel. It is that conflict of authority between the state and national governments which raises an important question of federal law which should be settled by this court.

Petitioners assert that the Florida courts' resolution of this issue in favor of the power of the state is in conflict with the applicable decisions of this court. To the extent that there is any doubt concerning this issue, which is central to the concept of federalism and division of powers, it is important that the issue be settled by this

court so that governmental authorities can know the correct relationship between the state and national governments.

In *Kaiser Aetna v. United States*, 444 U.S. at 168-69, the owner of the bottom land sought judicial review of the Corps of Engineers' ruling in the U.S. District Court. No attempt was made to bypass the authority of the courts of the United States. It is this jurisdictional matter which distinguishes the present case from the *Kaiser Aetna* decision and which is at the heart of the questions presented for review in this court. Further, *Kaiser Aetna* makes clear that in resolving the substantive issue of the case the trial court is to examine the economic impact of the Corps' regulation, interference with reasonable investment backed expectations and the character of the governmental action. It is the failure of the Florida trial court to follow the factual inquiry outlined in *Kaiser Aetna* which forms the basis for the third question presented for review by the plaintiff. If anything, *Kaiser Aetna* is an applicable decision of this court which is in conflict with the decisions of the Florida courts below.

CONCLUSION

The present case raises important questions of federal law that concern the relationship between state and federal authority and the right to navigate waters connecting to interstate and foreign commercial routes. Petitioners pray that the court assume jurisdiction over the case so that these issues can be resolved.

Date: September 12, 1989

JOHN H. THOMAS
Attorney for Petitioners
John M. Picciolo, Defender
Yacht Corp. and Atlantic
Aeromarine Associates, Inc.
3037 S.W. 4th Avenue
Miami, Florida 33129
Tel: 305-858-0200

JOEL V. LUMER
Attorney for Petitioners
John M. Picciolo, Defender
Yacht Corp. and Atlantic
Aeromarine Associates, Inc.
1002 Concord Building
66 West Flagler Street
Miami, Florida 33130
Tel: 305-374-3168
Counsel of Record